IN THE CIRCUIT COURT OF TAZEWELL COUNTY.

NORFOLK & WESTERN RAILWAY COMPANY v. GRAHAM LAND AND IMPROVEMENT CO. AND OTHERS.*

June, 1904.

1. RIPARIAN OWNER—*Rights at common law.*—At common law a riparian owner has no property in the water, but a mere usufruct in it as it passes along, and he may use it for the following purposes: (1) To supply the wants of man and animal; and each owner of the land, through or by which the stream flows, is at liberty to take as much as may be necessary for these purposes, even if it is thereby entirely consumed in the use. (2) For agricultural purposes, such as irrigation, and for manufacturing purposes; but for these purposes he shall use the same in a reasonable manner, so as not to destroy or render useless or materially diminish the flow, so as to affect the application of the water by the riparian owners or proprietors below.

2. RIPARIAN OWNER—*What a reasonable use for manufacturing purposes.*—As to what is a reasonable use for manufacturing purposes and for irrigation depends upon the circumstances of each case, having due regard to the capacity of the stream and the rights and necessities of the riparian proprietors below.

3. RIPARIAN OWNER—*Railway company—Water for locomotives.*—It has been frequently held that where a railroad company is a riparian proprietor, either by virtue of its right of way crossing a stream or otherwise, it may take therefrom a reasonable amount of water for the purpose of supplying its locomotives or for other use. They cannot, however, take more than a reasonable amount, except in the exercise of the power of eminent domain.

4. RIPARIAN OWNER—*Remedies for invasion of rights.*—Where the rights of a riparian owner have been invaded, his remedies are, if he suffer substantial injury, first, by injunction, and second, action f r recovery of damages to the extent of his injury.

5. RIPARIAN OWNER—*When equity will give aid.*—Equity will not aid one by an injunction where he sustains no actual damages further than to vindicate his right and prevent a loss of it by adverse use of it and lapse of time.

6. RIPARIAN OWNER—*Sec.* 1099 [1105*f*, (22), *Va. Code* 1904] *construed*—"*Not required.*"—Under sec. 1099 [1105*f*, (22), Va. Code 1904), providing that a railroad company can only condemn water *not required* by the owner, the words "not required" refer to the necessities of the owner or riparian proprietor at the time of the taking and has no reference to possible future requirements.

*Reported by George C. Gregory.

7. RIPARIAN OWNER—*Sec.* 1099 [1105*f*, (22), *Va. Code* 1904], *construed*—"*Affected thereby.*"—Under the statute providing that notice shall be given to riparian owners having an interest likely to be affected thereby, the words "affected thereby" have reference to a substantial injury and not to a nominal one.

The opinion states the case.

Henry & Graham and *S. D. May,* for railway company.

Chapman & Gillespie, for land and improvement company.

HON. W. J. HENSON, Judge:

This was a proceeding under sec. 1099 of the Code as amended by the Acts of the Virginia legislature of 1887-8, page 528,* by the Norfolk and Western Railway Company to condemn certain water of Bluestone River for the use of its engines, both locomotive and stationary. The county court sustained the condemnation proceedings, condemned the required water, but required the Norfolk and Western Railway Company to maintain water meters, so that the exact amount of water taken by the company each day could be ascertained, and also allowed the riparian owners and those claiming under them the privileges of entering the Norfolk and Western Railway Company's pump houses and premises for the purpose of examining said water meters. This requirement as to water meters is assigned as error, and a writ of error has been granted by this court, to so much of the county court's order as relates to these water meters.

The Graham Land and Improvement Company and other defendants in error, cross-assign various errors committed by the county court, and ask for an entire reversal.

In order to understand the statute under which these proceedings were had, it will be well to refer to the law as to the rights of riparian owners, independent of the statute.

The riparian owner has no property in the water, a mere usufruct in it as it passes along, and he may use it for the following purposes: First, the primary use is for natural and domestic purposes, in order to supply the wants of man and animal, and each owner of the land, through or by which the stream flows, is at liberty to take as much as may be necessary for these purposes, even if it be thereby entirely consumed in the use. Second, he may also use the

* [Now Va. Code (1904), section 1105f (22)].

same for agricultural purposes, such as irrigation, and for manufacturing purposes, but for these purposes he shall use the same in a reasonable manner, so as not to destroy, or render useless or materially diminish the flow, so as to affect the application of the water by the riparian proprietors below, and if in such use, he temporarily diverts a part of the stream, he must cause same to be returned to the channel below. 3rd Minor's Inst., vol. 1, pp. 16 and 17, and cases there cited.

As to what is a reasonable use for manufacturing purposes and for irrigation, depends on the circumstances of each case, having due regard to the capacity of the stream, and the rights and necessities of the riparian proprietors below. 3rd Minor's Inst., supra. *Wees* v. *Oregon Iron & S. Co.,* 13 Oregon 496.

The law of riparian right and the uses to which he may put the water, has kept pace to a great extent with modern civilization and until we have now almost, if not quite, the rule that a riparian owner has the right to use the water in any reasonable manner, so that such use does not injure and is not likely to injure the lower riparian proprietor.

The tendency of the modern authorities may be found in the case of *Crawford* v. *Hall,* from the Nebraska Supreme Court, and reported in 60 L. R. A. 889. On page 902, the court, approving other cases cited, says: "While as an abstract rule of law, a riparian proprietor is entitled to the full flow of the stream as it is wont to flow by nature, yet the rule has so many exceptions, and has been so modified as the law has progressed, that the nature and extent of a riparian proprietors' pecuniary interest or property in a stream cannot be measured by such a rule, nor can the rule now be said to be a full and accurate statement of the law. The law does not recognize a riparian property right in the *corpus* of the property."

I will not quote further from the opinion, or the copious extracts from other opinions, therein found, but simply refer to the case.

As to the rights of a railroad company, which is a riparian owner, to use the water from a stream for its locomotives and engines, it has been frequently held that where such railroad company is a riparian proprietor, either by virtue of its right of way crossing a stream or otherwise, it may take therefrom a reasonable amount of water for the purpose of supplying its locomotives, or for other use. *Elliot* v. *Fitchburg R. R. Co.,* 10 Cushing 191; *Penna. R. R. Co.* v.

Miller, 112 Pa. S. 34; *Earl of Sandwich* v. *The Great Northern Railway Co.,* L. R. 10, Chan. Div. 707. They cannot, however, take more than a reasonable amount, except in the exercise of the power of eminent domain, and as to what is a reasonable amount, we have stated above.

Where the rights of a riparian owner have been invaded, his remedies may be stated as follows: If he suffers substantial injury, he may have an injunction. *Gardner* v. *Newburg,* 2 Johns. Chan. 152, and other cases cited, in note to the case of *Ulbright* v. *Eufola Water Company,* 4 L. R. A. 572. And, of course, he may have an action for and recover substantial damages to the extent of his injury.

But where the diversion, although it be unlawful, does the lower riparian owner no actual damage, he can, of course, recover at law only nominal damages. *Stein* v. *Burden,* 65 Amer. Dec. 394; *Ulbright* v. *Eufola Water Co., supra; Parker* v. *Griswold,* 42 Amer. Dec. 739. And equity will not aid him by an injunction where he sustains no actual damages, further than to vindicate his right and prevent a loss of it by adverse use of it and lapse of time. See *Ulbright* v. *Eufola Water Company* above cited; *Smith* v. *Rochester,* 92 N. Y. 463; *Clinton* v. *Myers,* 7 Amer. Rep. 373-9.

This was the state of the law when the statute under which these proceedings were had was enacted.

Many years prior to the amendment which allowed the taking of water the statute permitted the taking by any company incorporated for any work of internal improvement any wood, stone, gravel or earth, to be used in the construction of its work, etc. The reasons for the enactment of this statute are obvious and need no comment, and the reasons for the amendment including the taking of water and land for pump houses, etc., are likewise obvious. Railroads cannot run without water, but the construction of the statute is very difficult. In the first place, a railroad company can only condemn water *not required by the owner.* Now, what is meant by the words "not required?" For if the water is required by the owner, no matter how great the necessity on the part of the railroad company, or how small the requirement by the riparian owner, the statute gives no power to take.

I am of the opinion that the words "not required" refer to the necessities of the owner, or riparian proprietor, at the time of the

taking, and has no reference to possible future requirements, so that, if the owner does not require it for present purposes, it may be taken, although there may be a possible requirement for the future. If the owner, or riparian proprietor, is the owner of any mill, or manufacturing plant, no matter how small or insignificant, at the time of the proceedings, and the water proposed to be taken is necessary for such purpose, there can be no taking. On the other hand, if at the time of the proceeding he has no such plant, but has water power, which he may possibly use in the future and would contend that he required the water, this would be no bar to the taking, but, of course, he would have to be paid commensurate damages.

So much for the phrase "not required."

That part of the statute relating to the condemnation of land for the construction of reservoirs, pumping engines and machinery, and for location of pipes, is so plain that it needs no construction. Then the statute proceeds to prescribe who shall be made parties to this proceeding, to take the water. It will be of interest to note that the statute says that they shall give notice to any riparian owner having an interest likely to be affected thereby, and that it does not require that all lower riparian owners shall be made parties. I think the words "affected thereby" have reference to a substantial injury, and not to a nominal one. In other words, they must give notice to riparian proprietors, who are likely to suffer substantial injury, and for whom an injunction would lie, or who could recover substantial damages, for the diversion, in contradistinction to the lower riparian owners, who might only have the right to nominal damages, if any at all.

It was never contemplated that in the larger streams of this commonwealth, the water of which was proposed to be taken by the railroad company, that the riparian owner from the point where the water is taken, to the utmost confines of the commonwealth, should be made parties. Would it be contended that, if the C. & O. Railroad Company proposed to take water for its engines from the James River near Buchanan, it would be required to make all riparian owners from Buchanan to Tidewater parties to such a proceeding? Clearly not. If the railroad company was not a riparian owner, did not cross the river, it could, under sec. 1099, condemn a piece of land adjoining the river, erect its pump houses and water pipes,

become itself a riparian proprietor, and, in the exercise of its rights, reasonably use the water from the James, for the use of its locomotives, and no lower riparian owner would have any right to complain, and no cause of action, so that it is only where the riparian owner is liable to be injured substantially that it is necessary to make him a party. But it may be asked,"How can he be substantially injured, when you cannot take water, which he requires?" Because it is very clear, that if he has no present requirement and no reasonable future requirements, that he cannot be substantially injured, and would only be entitled to nominal damages; but it may be that the conditions are such that the water is such that although it is not a present requirement, yet this water power may be a valuable property right which can be and may be affected by the condemnation proceedings for which he must be paid.

Under this statute, a railroad company may use any and all water not required, and may use it only for its locomotives and stationary engines. So the limitation is the use to which it is put, and sufficient water must always be left to meet the requirements of the owner for such purposes as he was using it at the time of the taking.

The statute also says the commissioners must report the extent to which the wood, gravel, earth or water, is proposed to be taken, and the nature of the injury which may be done, etc. The word "extent" was in the statute before water was included, and had reference to wood, stone, gravel and earth, in which the owner had absolute property. I scarcely know what reference it has to water, because the first part of the statute says he may take "all not required by the owner," limiting it, however, to the uses specified. It is very clear to my mind that if a specific number of gallons are attempted to be condemned, and if for any reason the stream should become so low that there was not enough water left for the uses of the riparian proprietors, and for which it was required at the time of the taking, that the rights of the riparian proprietors would be greater than the railroad company, and the company would be compelled to leave enough water in the stream for such uses, although by so doing they would not get the specified number of gallons.

I think the court can infer in this case that the railroad company is a riparian proprietor because the record shows that on the banks

of the stream it has pump houses, etc., and if it is not a riparian proprietor, it could not get the water it proposed to condemn. So entertaining the foregoing views, as to the law of riparian ownership, of the statute in question, I will proceed to apply the same to the record in this case.

It is shown that Bluestone River at its very lowest flows at the rate of five million gallons per day, while the average flow is twenty millions a day. It is shown that the lower riparian owners use this water only for domestic purposes, so that if 500,000 gallons were taken daily, at the very lowest period of the stream, it would leave a daily flow of 4,500,000 gallons, while the average flow would leave 19,500,000 gallons. Some of the proprietors talk something about a future possible use for manufacturing purposes, but they fall far short of even showing that the stream which runs through their land is valuable as a water power. They do not show the character of the land, they do not show that there is any natural water power, they do not show that on their own lands an artificial water power could be constructed, without trenching upon the lands of other people.

In the case of *Plumleigh* v. *Dawson,* reported in 41 Amer. Dec. 199, citing numerous cases, it is said:

"The water power to which the riparian proprietor is entitled consists in the fall of the stream, when in its natural state, as it passes through his land, or along the boundary of it, or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it."

It is not shown that there is any sufficient fall on any one man's land, so that the stream could be utilized for a water power. Therefore, in this case, I shall treat the lower riparian owners as only requiring the water for domestic purposes.

It is shown that the extreme capacity of the Norfolk and Western pumps, if both are running, in 24 hours would only pump a little over 1,200,000 gallons, every 24 hours. And it is very clear from the evidence that even if it were to take that much, that no actual damage would be done to the lower riparian proprietors. They would have all the water, even in the driest season, that they could use, for domestic and agricultural purposes.

As before stated, the Norfolk and Western Railway Company is

a riparian proprietor, and I think as such is entitled to take all the water it needs for its engines, so that it can do so, without actual damage to the lower riparian proprietors, and certain it is, if that be true, it is not limited to the taking of 500,000 gallons per day, but is only limited to the uses to which it may put the water.

From what has been said it is apparent that there was no necessity (even if the court had the power) of requiring appellant to place water meters on its pump, and permit its premises to be entered in order that said meters might be inspected, and in this respect the judgment of the county court will be reversed.